BEFORE THE INSURANCE COMMISSIONER
OF THE STATE OF WASHINGTON

In the Matter of the Application regarding the Conversion and Acquisition of Control of Premera Blue Cross and its Affiliates	Docket No. G02-45 SPECIAL MASTER'S ORDER ON PREMERA'S MOTION TO STRIKE UNTIMELY MATERIAL

This matter comes before me on "Premera's Motion to Strike Untimely Material Submitted with Interveners' Post-Hearing Brief and References Thereto," dated June 3, 2004. I have considered Premera's Motion, Intervener's Response, dated June 8, 2004, and Premera's Reply, dated June 14, 2004.

Premera moves to strike 1) Attachments A, B, and C to the Interveners' Post-Hearing Brief (the *Amicus Curiae* brief of the National Association of Insurance Commissioners submitted to the Supreme Court of Kansas; a 27-page article entitled "*Cost, Commitment & Locality, A Comparison of For-Profit and Not-For-Profit Health Plans,*" released January 28, 2004; and a 32-page 1998 article entitled "*Nonprofit to For-Profit Conversions by Hospital and Health Plans: A Review*;" 2) all portions of Interveners' post-hearing brief referencing such attachments; and 3) all portions of Interveners' post-hearing brief incorporating and referencing additional matters beyond the scope of the record (material from the Alliance for Advancing Nonprofit Healthcare website; a 1996 article from American Medical News; a Consumer Reports Survey Report; a report by Carl Schramm; an article from Modern Healthcare; and a March 2, 2004 Seattle Times article).

Premera asserts: The materials at issue are no more than attempts by Interveners to introduce new evidence into the record, long after the deadline for submitting exhibits. If the Interveners had timely submitted such materials, Premera could have effectively responded. Premera would be prejudiced by the Commissioner's consideration of such untimely evidence.

Interveners respond: Premera attempts through its present motion to prevent the Commissioner from making a fully-informed decision. The materials at issue: 1) support the legal arguments made by the Interveners in earlier submissions (NAIC brief); 2) were discussed in Calvin Pierson's pre-hearing direct testimony and hearing direct testimony and addressed by Premera witness Kent Marquardt's pre-filed responsive testimony (Schramm Report); 3) were referenced and discussed during the hearing by Scott Benbow (Health Care Survey); 4) were submitted as an exhibit in advance of the hearing (*Seattle Times* article); or 5) are the sorts of materials (surveys, news articles, and scholarly research papers) routinely cited and relied upon by trial and appellate courts without regard to evidentiary foundation.

Premera replies: Interveners' untimely materials violate the pre-hearing orders governing this proceeding, fail to comply with statutory requirements for the Commissioner to take "official notice," and are not of the type that courts consider post-trial.

Discussion: WAC 10-08-130 provides that orders issued by the presiding officer "shall control the subsequent course of the proceeding unless modified for good cause by subsequent order." Here, my Revised Procedural Order, dated January 12, 2004, at 2, established an April 26, 2004 deadline for the parties to provide copies of all hearing

exhibits to the opposing parties and to the Commissioner. I repeatedly enforced this Order during the evidentiary hearing. Interveners' materials at issue in the present motion are untimely and must be excluded, unless they fall within some exception to the requirements of the Revised Procedural Order.

The NAIC did not seek to intervene in this proceeding. Perhaps the Washington appellate courts would permit the NAIC to file an *amicus* brief if the Commissioner's conversion decision is appealed, but the NAIC's Kansas *amicus* brief is untimely submitted for the Commissioner's consideration.

Though witnesses testified to having considered certain of the reports at issue, the reports themselves should not be, in effect, admitted into evidence in violation of the procedural orders herein. That a potential exhibit is referred to in testimony, or marked for identification but not offered, does not make that potential exhibit a part of the record. To permit the materials at issue to be injected into the record at this time would unfairly deny Premera the opportunity to respond through cross-examination, expert analysis, briefing, and/or argument.

The Interveners did not request before or during the hearing that the Commissioner take "official notice" of any of the materials at issue, as is required under RCW 34.05.452(5) for him to consider "judicially cognizable facts," "technical or scientific facts," or "codes or standards." Official notice, analogous to judicial notice, therefore does not permit consideration of the materials at issue.

Finally, the materials are not of the sort that courts consider when untimely submitted. In *Parents Involved v. Seattle School District*, 149 Wn.2d 660, 678 (2003), the Court cited certain Seattle Times articles for "historical perspective" about the

"heated national debate," concerning the curtailment of affirmative action, but did not rely on the articles as substantive evidence. In *State v. CPC Fairfax Hospital,* 129 Wn.2d 439, 454 (1996), the Court upheld the denial of a motion to strike *amicus* brief appendices that contained scholarly reports, because "we do not understand nor do we consider these authorities to establish the specific facts of this case but rather 'legislative facts' which the court may consider when determining the constitutionality or interpretation of a statute." In *State v. Barnes*, 117 Wn.2d 701, 709 (1991), the Court cited legal research studies in the context of determining that "the extension of the future dangerousness factor to nonsexual offense cases violates the certain purposes of sentencing reform." In none of the above cases, which were cited by the Interveners, did the courts permit new materials bearing on the decision-maker's Findings of Fact and Conclusions of Law to be injected into the record post-trial, as Interveners here attempt.

Ruling: Attachments A,B and C to the Interveners' Post-Hearing Brief, all portions of the Post-Hearing Brief referencing such attachments, and all portions of the Post-Hearing Brief referencing material beyond the scope of the record are hereby stricken. Interveners' materials containing portions stricken by the present order shall be replaced with redacted versions, Exhibit A to the Emerson Declaration dated June 3, 2004.

DATED this 17th day of June, 2004.

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George Finkle
Superior Court Judge, Retired
Special Master